No. 89-1994

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROLAND MASTANDREA, *et al.*,
Petitioners,

v.

THE NEWS-HERALD, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of Ohio Eleventh Appellate District Lake County, Ohio

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

A. The Facts

This case presents a classic public-official libel case arising from a city mayoral campaign characterized by polemical rhetoric and political hyperbole. The Petitioner, Roland Mastandrea ("Mastandrea") was a losing candidate for Mayor of Willoughby, Ohio. At the time Mastandrea ran for office he was also serving as a city councilman. There is no issue that in this libel action Mastandrea was both a public official and public figure. Petition at 32. The Lake County News-Herald, a newspaper of general circulation in Willoughby, published articles covering the campaign, including matters of particular public interest generated by Mastandrea's campaign.

Following his loss of the election Mastandrea sued, *inter alia*, Respondents herein, The Lorain Journal Co. as owner of the Lake County News-Herald (hereinafter collectively "News-Herald") and News-Herald reporter Paul O'Donnell ("O'Donnell")[1] for statements in one of the election coverage articles published in the News-Herald on November 8, 1983 ("Article"). Petition Appendix at A40. Specifically, Mastandrea complained only about the headline and the first sentence of the Article. The headline stated:

> Mastandrea admits distributing 'smear fliers'

The first sentence of the Article stated:

> Willoughby mayoral candidate Roland J. Mastandrea admits he and several campaign supporters distributed anonymous literature last weekend attacking Mayor Eric Knudson and four councilmen.

Mastandrea claims that the words "admits", "distributing," and "distributed," were libelous. Petition at 19.

Events leading to the Article began in August, 1983, when Mastandrea entered the Willoughby mayoral race. At that time Mastandrea campaign supporters met to discuss campaign literature. Although Mastandrea did not arrive until the end of that meeting, he later told O'Donnell that he had known about the meeting's agenda. From that meeting evolved a piece of campaign propaganda entitled "Wake Up Willoughby." *See* Petition Appendix at A41. This soon-to-be-infamous flier attacked

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[1] Mastandrea sued others, including media defendants Rowley Publications and Geoffrey Haynes, who are separate Respondents to Mastandrea's Petition to this Court. To clarify the status of the parties, Mastandrea originally sued the Lorain Journal Co., as owner of the Lake County News-Herald, as well as O'Donnell. Throughout the record of this case, The Lorain Journal and the News-Herald have been referenced interchangeably. The News-Herald, which is not an incorporated entity, is owned and published by The Lorain Journal Co. The Lorain Journal Co. is owned by Community Newspapers, Inc. *See* Sup. Ct. Rule 29.1.

the incumbent mayoral candidate, Eric Knudson, and four of Mastandrea's fellow councilmen. The flier described these five men as a "special interest group" which was tampering with the "checks and balances of government" and spending "thousands & thousands to buy votes." Referring to the councilmen as the "Mayor's hand-picked cronies," the flier characterized the Knudson group as an entrenched elite "who were conspiring to hide information from the public." *See* Petition Appendix at A41.

A few days before election day, "Wake Up Willoughby" was delivered to Robert J. Smeker, proprietor of Riverside Press, who was the printer for Mastandrea's campaign. Mr. Smeker swore in deposition that it was Mastandrea who delivered "Wake Up Willoughby" for printing. Ten thousand copies of the flier were printed and distributed "anonymously" by Mastandrea's campaign workers on November 4, 1983. Not surprisingly, the unsigned accusations created a local uproar of speculation about the identity of the flier's author.

On the evening of November 4th, a copy of "Wake Up Willoughby" was delivered to the News-Herald. Mr. David Jones ("Jones"), a News-Herald reporter, made several inquiries, and wrote an article about "Wake Up Willoughby" for the Saturday morning edition of the News-Herald (November 5, 1983).[2] This article, headlined "Handbills infuriate Knudson's supporters," quoted those supporters, who described "Wake Up Willoughby" as untrue "smear" literature.

The quotations in the November 5th article succinctly illustrated the tenor of this campaign. In addition to characterizing the flier as a "smear", Knudson supporters stated that the anonymous author of "Wake Up Willoughby" was a "mudslinging creep" and a "skunk," and

[2] A copy of this article appears in the Appendix attached hereto. *See* p. 1a, *infra*.

that the flier was "yellow journalism at its worse," "scurrilous literature," and a "last-ditch effort" to create confusion in the campaign.[3] *See* p. 2a, *infra*.

On Saturday, November 5, 1983, Jones and O'Donnell continued to inquire into the identity of the source of "Wake Up Willoughby." They contacted the mayoral candidates, including Mastandrea, all of whom denied any knowledge of the flier. On November 6, 1983, the News-Herald published a second story by Jones entitled "Handbill draws condemnation in Willoughby." *See* p. 3a, *infra*. Mastandrea not only denied any connection with "Wake Up Willoughby" at this time, but criticized the wording of the flier. At the same time, however, Mastandrea told the News-Herald that the statements in the flier were true.

In response to the flier's controversy, Mastandrea met with his campaign committee on November 7, 1983, election eve, and composed another piece of literature entitled "From R. Mastandrea," styled as an open letter to Willoughby residents about the "Wake Up Willoughby" flier. *See* Petition Appendix at A42. In this letter, Mastandrea stated:

> With this letter *I* hereby intend to take full responsibility for this handout. *I* would earnestly appeal to you the people of Willoughby to patiently read further and learn the *purpose of its writing* and *method of its distribution*.
>
> Were this information to have been provided to the people of Willoughby in the form of campaign literature by a candidate or committee, *it is my belief* that it would have detracted from its validity. Therefore the handout was not produced or paid for by the Committee to Elect Roland Mastandrea. Nor

[3] Mastandrea has never contested the truth of any of the statements in the November 5th article. That article, along with a follow-up article on November 6, 1983, supply the context of the Article which is at issue in this case.

> did it specifically ask support for any particular candidate. However, it sought to provide the people of Willoughby factual information on two issues that *I* believe are crucial to the future of Willoughby. (Emphasis added.)

Mastandrea then attempted to explain away the distribution of "Wake Up Willoughby:"

> The mechanics of the handout were unfortunate; however, the real misfortune of this 1983 election is not what has been said but what has not been said. This handout was intended only to inform the people of Willoughby of what *I* believe they would want to know. *I* urge you to continue to support my candidacy for Mayor. (Emphasis added.)

Petition Appendix at A42. With clear personal references, Mastandrea thus published to the people of Willoughby that he took "full responsibility" for the flier, that his belief and ideas were expressed in the flier, that he understood its purpose and intent, and that he regretted the method of its distribution. "From R. Mastandrea" bore Mastandrea's signature and was paid for by his campaign committee.

Mastandrea's workers distributed "From R. Mastandrea" to 6,000 Willoughby homes, and Mastandrea personally delivered a copy of it to the News-Herald on November 7, 1983. O'Donnell read it and interviewed Mastandrea, who told O'Donnell, "I feel that I am the leader, and I am responsible for what I and others do. *I knew about it* [*'Wake Up Willoughby'*] *and I didn't stop it.*" (Emphasis added.)

Mastandrea also told O'Donnell, "If I had put out the literature as a candidate, it would be just another piece of political material. The intention was to put out an informative piece of material of what *I feel* and what others feel, they should know about the election." (Emphasis added.) The Article contains these quotations from the Mastandrea interview as well as other Mastan-

drea statements. Mastandrea has never contested the accuracy of these quotations.

Mastandrea's sole complaint in this libel action is the Article's statement that he admitted to distributing "Wake Up Willoughby." Mastandrea asserts that the News-Herald's editors changed O'Donnell's story to knowingly add a falsehood to the headline and lead, i.e., adding the words "admits distributing." However, Mastandrea has provided no clear and convincing evidence that O'Donnell and the News-Herald editors believed these words to be false or recklessly disregarded the truth in choosing those words. In fact, there is no evidence at all that the words were false.

The sources for the Article were "Wake Up Willoughby" itself; the News-Herald's investigation of the flier on November 5 and 6, 1983 (including discussions with Mastandrea); O'Donnell's interview with Mastandrea on November 7, 1983, and the remarkable text of "From R. Mastandrea." O'Donnell stated that before and after the Article's publication he believed the Article to be fair, truthful, and accurate. Moreover, the Article extensively quoted Mastandrea himself, accurately reporting his views about a campaign issue of his own making. The headline of the Article served to link it with the previous articles quoting Knudson's supporters ("smear"), and stated the obvious import of Mastandrea's statements in "From R. Mastandrea," and in his interview with O'Donnell.

On November 10, 1983, two days *after* publication of the Article, a defeated and bitter Mastandrea met with O'Donnell. (Later, Mastandrea revealed he had covertly tape-recorded this meeting with O'Donnell.) In the transcript Mastandrea stated: "I told them [the News-Herald] that I new (*sic*) about it and was aware of who was doing it, but I did not distribute it nor did the Committee to Elect Mastandrea for Mayor."

During this conversation Mastandrea blamed the News-Herald for putting in the headline that he admitted to distributing "Wake Up Willoughby." But Mastandrea also told O'Donnell, "I agree, agree with most of it [the Article]." Finally, O'Donnell asked Mastandrea the obvious question, "When you came out and took full responsibility don't you think you cut your own throat?"

Mastandrea answered, "I cut my own throat for the election, yeah and I knew but well yeah, I will take responsibility . . . for not having a tight control and having lousy committee or something." [4]

As noted by the Ohio Court of Appeals, nowhere in the transcript of this conversation is there any indication that O'Donnell and the News-Herald ever disbelieved the truth of the Article at the time of its publication. Regarding the Article's statement about Mastandrea's admitting to distribution of "Wake Up Willoughby," O'Donnell and the News-Herald clearly concluded from reading "From R. Mastandrea" and from O'Donnell's interview with Mastandrea, that Mastandrea was the moving force behind, and therefore the pubisher and "distributor" of "Wake Up Willoughby," and that in "From R. Mastandrea" he admitted as much.

The facts simply demonstrate that the Article truthfully reported facts and campaign commentary about a controversy spawned in bitter election politics. Mastandrea's political demise was not the fault of the News-Herald or O'Donnell, who had both the obligation and the constitutional right to publish the Article, and, moreover, did so upon Mastandrea's express invitation.

B. The Proceedings Below

Mastandrea filed his original complaint *pro se* on November 7, 1984 and an amended complaint with assistance of counsel on May 24, 1985. Mastandrea's wife,

[4] Quotations are from the transcript, which is part of the Record.

Maureen, claimed injury derivative of Mastandrea's claims. Discovery proceedings included numerous depositions. On February 1, 1988 the trial court granted summary judgment in favor of O'Donnell and the News-Herald. On November 8, 1989 the Ohio Eleventh District Court of Appeals affirmed the judgment of the trial court. Petition Appendix at A3. The Ohio Supreme Court dismissed Mastandrea's appeal on March 21, 1990. Petition Appendix at A1.

SUMMARY OF ARGUMENT

This case offers no new or novel wrinkle of libel law. As to Respondents herein, Mastandrea is a public-official libel plaintiff alleging defamation by media defendants for political campaign coverage. The principles of law applied to this case are well-settled rules developed by precedents of both the United States Supreme Court and the Ohio Supreme Court. This case is in accord with these precedents and thus presents none of the criteria for granting *certiorari* set forth in Sup. Ct. Rule 10.1.

The Ohio Court of Appeals carefully applied the summary judgment standard for libel cases under Ohio Civ. R. 56 in affirming the trial court's judgment. Mastandrea failed to carry the requisite burden of showing by clear and convincing evidence that a jury could find the alleged libel false and published with actual malice. Respondents respectfully submit that this case is no more than another election controversy which was duly reported by the newspapers. The judgment in this case is not in conflict with federal or state law and presents no facts or application of law necessitating the review and guidance of this Court.

THE REASONS FOR DENYING THE WRIT OF CERTIORARI

I. A PUBLIC OFFICIAL PLAINTIFF IN A DEFAMATION SUIT AGAINST A MEDIA DEFENDANT MUST ESTABLISH THE FALSITY OF THE ALLEGED DEFAMATORY STATEMENT. MASTANDREA FAILED TO ESTABLISH WITH CLEAR AND CONVINCING EVIDENCE THAT THE ALLEGED LIBELOUS STATEMENTS WERE FALSE. THE ARTICLE WAS SUBSTANTIALLY TRUE AND NOT DEFAMATORY.

Ohio law provides that where an alleged defamatory publication is substantially true, an action for defamation does not lie. *Shifflet v. Thomson Newspapers (Ohio), Inc.*, 69 Ohio St. 2d 179 (1982). This rule is in accord with the United States Supreme Court's requirement that a public-official defamation plaintiff prove by clear and convincing evidence that the alleged libelous statements are false. *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 775-78 (1986); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) ("a public official [is] allowed the civil remedy [of defamation] only if he establishes that the utterance was false"); *Herbert v. Lando*, 441 U.S. 153, 176 (1979) ("plaintiff must focus on the editorial process and prove a false publication attended by some degree of culpability"); *see* also, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 489-90 (1975).

The public official's burden to prove falsity is a constitutional requirement imposed by the First Amendment. *Philadelphia Newspapers v. Hepps*, 475 U.S. at 776-77; *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964). In *Garrison v. Louisiana*, this Court stated:

> We held in *New York Times* that a public official might be allowed the civil remedy [of defamation] only if he establishes that the utterance was false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or

> true . . . truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned.
>
> * * * *
>
> For speech concerning public affairs is more than self-expression; it is the essence of self-government.

379 U.S. at 74-75.

The plaintiff must carry this burden of clear and convincing evidence in the summary judgment context. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254-56 (1986).[5] Moreover, the Constitution requires that where the evidence is ambiguous as to whether a configuration of speech is true or false, truth must be presumed. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. at 776.

> We recognize that requiring the plaintiff to show falsity will insulate from liability some speech that is false but unprovably so. Nonetheless, the Court's previous decisions on the restrictions that the First Amendment places upon the common law of defamation firmly support our conclusion here with respect to the allocation of the burden of proof. In attempting to resolve related issues in the defamation context, the Court has affirmed that "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters." *Gertz* [*v. Robert Welch, Inc.*], 418 U.S. [323], at 341 [1974] . . . To provide "breathing space" *New York Times, supra*, [376 U.S.] at 272 (*quoting NAACP v. Button*, 371 U.S. [415] at 433 [1963]) for true speech on matters of public concern, the Court has been willing to insulate even *demonstrably* false speech from liability, and has imposed the additional requirements of fault upon the plaintiff in a suit for defamation. *See, e.g., Garrison* [*v. Louisiana*], 379 U.S., at 75; *Gertz* [*v. Robert Welch, Inc.*], *supra*, [418 U.S.], at 347. We therefore do not break new

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[5] Regarding summary judgment standard, see discussion under Part III *infra*.

> ground here in insulating speech that is not even demonstrably false.
>
> We note that our decision adds only marginally to the burden that the plaintiff must already bear as a result in our earlier decisions in the law of defamation. The plaintiff must show fault.

Id. at 778.

As a public official at the time of the Article, Mastandrea's actions and statements with respect to official and/or political events in Willoughby were of paramount public interest and especially appropriate for news coverage and public comment. Mastandrea thus had the burden of opposing summary judgment with clear and convincing evidence that statements in the Article were false. *Id.* at 775; *Garrison v. Louisiana*, 379 U.S. at 74. This he could not do. The record overwhelmingly supports the substantial truth of the Article.

Mastandrea's single claim is that the Article falsely stated that he admitted to distributing the flier "Wake Up Willoughby". It is difficult to follow this reasoning in view of Mastandrea's campaign workers' role in the distribution of the flier, his endorsement and knowledge of it, and acceptance of *responsibility* for it—all of which he proclaimed to the Willoughby voters in "From R. Mastandrea." Thus, the quintessential flaw in Mastandrea's libel claim against the News-Herald is that by his own publication, *he identified himself* with "Wake Up Willoughby." Taking "full responsibility" and professing knowledge of "the purpose of [the flier's] writing and method of distribution" reduces his argument that he did not distribute the flier to a matter of splitting hairs.

Mastandrea would confine "distribute" to the act of physically taking the flier in hand and giving it to someone else. He claims he did not do this. It is incredible that anyone would seriously consider the Article to mean that Mastandrea physically, singlehandedly distributed

the flier. Ten thousand copies of "Wake Up Willoughby" were distributed by several people. Similarly, Mastandrea and his group blanketed Willoughby with 6,000 copies of "From R. Mastandrea." No one would believe that the News-Herald meant that Mastandrea personally undertook such a task.

Additionally, Mastandrea's point carefully ignores the principle that one who takes responsibility for an act of his agents ratifies the act as if he did it himself. Mastandrea told O'Donnell that he had known about "Wake Up Willoughby"; in fact, that was his message in "From R. Mastandrea," which he published in the midst of intense speculation as to the source of "Wake Up Willoughby." Mastandrea confessed to the people of Willoughby that the flier emanated from his campaign suppoters, that he fully endorsed it, that there was a political reason for it to be anonymous, and that every word of it was true. The very purpose of "From R. Mastandrea" was to identify "Wake Up Willoughby" with himself in the name of truth.

Clearly such acts and statements constituted an "admission." The American Heritage Dictionary at 80 (2d coll. ed. 1982) defines "admit" as, *inter alia*, "to acknowledge, confess, to grant as true or valid, to accept or allow as true or valid." This definition precisely describes "From R. Mastandrea." Moreover, Mastandrea personally made sure that the News-Herald would cover his admission in its election day edition. To that end, he told O'Donnell, "I feel that I am the leader and I am responsible for what I and others do. I knew about it and I didn't stop it." It was not the News-Herald's Article that cast opprobrium over Mastandrea's campaign. His troubles came from "Wake Up Willoughby" and "From R. Mastandrea."

Throughout "From R. Mastandrea" Mastandrea explained "Wake Up Willoughby" in terms of "I" and other terms signifying Mastandrea's personal connection with

the accusations against Knudson. Mastandrea gambled that publicly acknowledging and ratifying the flier would improve his campaign. That he expected Willoughby voters would not conclude that he had a hand in its "distribution" is ludicrous. He lost the gamble and the election. Thereafter he sought to distance himself from the "Wake Up Willoughby" controversy by blaming the News-Herald for his election defeat.

Simply put, Mastandrea did not, and could not, bring forth competent evidence sufficient to sustain his burden of showing that the News-Herald's Article was false. The Article was simply one in a series of election coverage. That Mastandrea was particularly upset with the Article merely reflected his chagrin for his poor political judgment and his loss of the election. He sought public support by slinging accusations against his incumbent opponent. When his election strategy backfired he cried "foul".

On basis of truth alone, the trial court was correct in granting summary judgment in favor of the Respondents herein. However, as set forth below, additional independent grounds supported the granting of summary judgment in this case, as held by the Ohio Court of Appeals.

II. MASTANDREA FAILED TO ESTABLISH ACTUAL MALICE BY CLEAR AND CONVINCING EVIDENCE.

To give Mastandrea every benefit of the doubt in a summary judgment proceeding, the Ohio Court of Appeals assumed as true that Mastandrea did not "distribute" the fliers, and focused upon whether the News-Herald and O'Donnell made such a statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. at 279-80. Although the principles underlying this inquiry are well-settled, they bear repeating.

In *New York Times*, the United States Supreme Court held that a First Amendment privilege attaches to speech concerning a public official. *Id.* This principle recognizes that a cherished freedom in this country is the freedom to publish fact, criticism, and commentary pertaining to the actions of public officials who wield or seek to wield the power of government. This freedom has "its most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

For this reason, *New York Times* and its progeny require a public-official defamation plaintiff to prove that the defendant made the alleged defamatory statements with actual malice. The interest protected by the actual malice standard is the "profound national commitment to the free exchange of ideas, as enshrined in the First Amendment [which] demands that the law of libel carve out an area of 'breathing space' so that protected speech is not discouraged." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. ——, ——, 109 S. Ct. 2678, 2695 (1989).

These principles are particularly compelling in the context of a political campaign. "Public discussion about the qualificaitons of a candidate for elective office presents what is probably the strongest possible case for application of the underlying *New York Times* rule." *Ocala Star-Banner v. Damron*, 401 U.S. 295, 300 (1971). In the words of James Madison:

> Let it be recollected, lastly, that the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.

4 J. Elliot, Debates on the Federal Constitution 575 (1861).

"Vigorous reportage of political campaigns is necessary for the optimal functioning of democratic institutions and central to our history of individual liberty." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. at ——, 109 S.Ct. at 2696. Political candidates are therefore forewarned. No candidate can cry "Foul!" when an opponent or the media demonstrate that the candidate lacks the "sterling integrity" which the candidate would like to impress upon the electorate. *See Monitor Patriot v. Roy*, 401 U.S. at 274; *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. at ——, 109 S.Ct. at 2695. Thus, the disappointed candidate cannot successfully prosecute a defamation action for every slight he perceives in the press. The challenged speech must be patently false and clearly published with actual malice.

Under the *New York Times* standard, Mastandrea had the burden of proving by clear and convincing evidence that the News-Herald and O'Donnell published the subject Article with actual malice. *New York Times Co. v. Sullivan*, 376 U.S. at 279-80. As discussed below, his burden was no less in the summary judgment context. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 254. The court must view the evidence and all justifiable inferences therefrom in the light most favorable to the non-moving party, but must nonetheless be guided by the *New York Times* clear and convincing evidence standard on whether a genuine issue of actual malice exists.

On appeal, it is the responsibility of the reviewing court "to conduct an independent examination of the record" to ensure against forbidden intrusions into the First Amendment freedom of expression and to constitutionally protect that expression. *Varanese v. Gall*, 35 Ohio St. 3d 78, 80, *cert. denied* 487 U.S. 1206 (1988); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 508, rehearing denied 467 U.S. 1267 (1984). The

determination of whether the record supports a finding of actual malice is a question of law. *Id.* at 510-511; *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. at ——, 109 S.Ct. at 2694.

Actual malice requires knowledge of falsity or reckless disregard for the truth—a high standard. "Reckless disregard" cannot be "fully encompassed in one infallible definition." *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968). It has been explained as the defendant's having made a false publication with a "high degree of awareness of . . . probable falsity," *Garrison v. Louisiana*, 379 U.S. at 74, or that the defendant "entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. at 731. In the public official defamation case, the Ohio Supreme Court has stated that the inquiry into actual malice "should focus on the publisher's attitude toward the truth rather than upon the publisher's attitude toward the plaintiff." *Perez v. Scripps-Howard Broadcasting Co.*, 35 Ohio St. 3d 215, *cert. denied* 109 S.Ct. 179 (1988). *Accord*, *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. at ——, 109 S. Ct. at 2698-2699.

The proper focus of the actual malice inquiry is upon the defendant's subjective belief about the truth of the challenged speech *at the time of its publication*. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. at 498. In order to prove actual malice, a public-official libel plaintiff must produce "independent evidence" that the defendants realized the inaccuracy of the statement, or entertained serious doubts about its truthfulness. *Id.*

Therefore, the News-Herald's political attitude toward Mastandrea, whatever that may have been, is beside the point. Instead, the proper inquiry is the News-Herald's attitude toward the truth at the time of publication. The Ohio Court of Appeals carefully analyzed Mastandrea's evidentiary submissions in light of this subjective standard, i.e. the News-Herald's and O'Donnell's "state of mind

at the time of publication of the Article." Petition Appendix at A16.

In *Connaughton*, this Court extensively analyzed the nature of proof sufficient to establish actual malice under the subjective standard.

> [T]here must be sufficient evidence to permit the conclusion that the defendant actually had a "high degree of awareness of . . . probable falsity." *Garrison v. Louisiana*, 379 U.S., at 74, 85 S.Ct., at 215. As a result, failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard. *See St. Amant*, *supra* 390 U.S., at 731, 733, 88 S.Ct., at 1325, 1326. *See also*, *Hunt v. Liberty Lobby*, 720 F.2d 631, 642 (CA11 1983); *Schultz v. Newsweek, Inc.*, 668 F.2d 911, 918 (CA6 1982). In a case such as this involving the reporting of a third party's allegations, "recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *St. Amant*, *supra*, 390 U.S., at 732, 88 S.Ct., at 1326.

Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. at ——, 109 S.Ct. at 2696.

In *Connaughton*, the media defendant had interview tapes available, but "no one at the newspaper took the time to listen to them." *Id.* The newspaper also failed to interview a key witness who had information highly relevant to the story. The Court viewed this willful inaction as a "product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity" of the published charges against Connaughton. *Id.* Noting that "failure to investigate" will not alone support a finding of actual malice, the Court held "the purposeful avoidance of the truth" to be in a different category. *Id.* at 2698.

This Court reached a similar decision in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), where a news-

paper chose to print only the version of an unreliable informant and refrained from interviewing another witness with knowledge of the facts and from viewing films of the actual events in question. Such conduct indicated that the newspaper had gone beyond a "departure from professional publishing standards," in itself not sufficient for actual malice, but had satisfied the "more demanding *New York Times* standard." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. at ——, 109 S.Ct. at 2699.

Connaughton and *Butts* demonstrate the type of egregious circumstances and abuse which rise to the standard of actual malice. Simple error or negligence do not meet the standard. For example, in *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 84-85 (1967) the Court rejected the plaintiff's assertion of actual malice in the defendant's publication that plaintiff, a public official, had intimidated another public official. Plaintiff argued that since he and the other official denied any threats or intimidation, the newspaper's admission of failing to conduct an investigation of the facts prior to publication constituted clear and convincing proof of reckless disregard for the truth. The plaintiff relied on the following testimony of the newspaper as evidence:

> Q: But you can't tell this jury that any specific investigation was made before this man was attacked in any of these articles, can you?
>
> * * * *
>
> A: We watch the activities of the public servant. You don't have to make an investigation. His whole life is out in front of everybody.
>
> Q: Those editorials were not written by anybody who wanted to find out whether or not he threatened Mrs. Hurt, were they?
>
> A: There was cause on their part to feel there was that possibility.
>
> Q: That possibility?
>
> A: That's right. "Perhaps," they said.
>
> * * * *

> A: It was our opinion that that was as near the facts and truth as we could get.

Id. at 84. In holding that this did not prove actual malice, the Court stated:

> Neither this passage nor anything else in the record reveals "the high degree of awareness of . . . probable falsity demanded by *New York Times* . . . [I]t cannot be said on this record that any failure of petitioner to make a prior investigation constituted proof sufficient to present a jury question whether the statements were published with reckless disregard of whether they were false or not.

Id. at 84-85.

Like Mastandrea's denial of "distribution," the plaintiff in *Hanks* denied the inference of intimidation, and claimed that the newspaper purposely avoided the truth by failing to investigate further. The Court found this insufficient for a jury to find that the statements were published with actual malice. *See*, also, *New York Times v. Sullivan*, 376 U.S. at 287-288 (failure to check advertisement's accuracy against newspaper's own files did not establish knowledge of falsity or reckless disregard for the truth); *Time, Inc. v. Pape*, 401 U.S. 279, 292 (1970) (Time's erroneous interpretation of an ambiguous report was at most an error of judgment insufficient to constitute reckless disregard for the truth required by the actual malice standard).

From *New York Times* to *Connaughton* the Court has provided parameters for determining the presence or absence of actual malice in media publications. The instant case is nothing like the situations in *Connaughton* and *Butts*, where the Defendants clearly ignored the truth. Mastandrea has not demonstrated such a purposeful avoidance of the truth, or even a failure to investigate.

O'Donnell stated in support of summary judgment that he "believed the story to be fair, accurate and truthful

at the time it was published, and still believes the [A]rticle to be entirely fair, accurate and truthful." The Article was the third in a series of reportage of the "Wake Up Willoughby" controversy. News-Herald reporters had been interviewing election campaign participants, including Mastandrea and his people. Rather than ignoring Mastandrea's point of view, the News-Herald gave him extensive exposure and published his statements in the Article, the accuracy of which Mastandrea has not challenged. Moreover, the Article was published the day after Mastandrea's own circulation of "From R. Mastandrea" to 6,000 Willoughby homes. Therefore, Willoughby readers had seen "From R. Mastandrea" before the Article came out.

Mastandrea's evidence in opposition to summary judgment was composed of: copies of the Article, "Wake Up Willoughby," "From R. Mastandrea," a transcript of the November 10, 1983 meeting between Mastandrea and O'Donnell, and testimony of some Mastandrea supporters that they told O'Donnell that Mastandrea did not physically distribute "Wake Up Willoughby."

As to the Article itself, the Ohio Court of Appeals correctly observed that the Article did not provide independent evidence of actual malice, as "no contention is made and none could be made, that the [statements therein] . . . are 'so inherently improbable that only a reckless man would have put them in circulation.'" *St. Amant v. Thompson*, 390 U.S. at 732. Petition Appendix at A16.

Mastandrea principally relies on the November 10, 1983 meeting with O'Donnell for evidence of actual malice. But nothing in this conversation demonstrated that O'Donnell or the News-Herald had actual knowledge of any falsity in the Article, that they had reason to possess a "high degree of awareness of probable falsity," or that they "entertained serious doubts to the truth" of the Article at the time of its publication. *Id.* at 730; *Garrison v. Louisiana*, 379 U.S. at 74; *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. at 512.

What the News-Herald did know prior to publication of the Article was the "Wake Up Willoughby" controversy in light of "From R. Mastandrea", announcing Mastandrea's "responsibility" for and endorsement of "Wake Up Willoughby." This series of events was highly probative of the sincerity of O'Donnell's and the News-Herald's belief that by publishing "From R. Mastandrea," Mastandrea was "admitting" to distribution of "Wake Up Willoughby."

Construing "From R. Mastandrea" in the most favorable light possible for Mastandrea, it was at best ambiguous. Clearly, "From R. Mastandrea" revealed Mastandrea's involvement with "Wake Up Willoughby", strongly indicating a role in distribution. Such was the conclusion expressed in the Article. In a situation where facts are ambiguous, the mere selection of the most damaging inference by the reporter does not, alone, indicate actual malice. *Time, Inc. v. Pape*, 401 U.S. at 290. The question is whether the reporter believed the inference was true. *Id.*

Moreover, the News-Herald and O'Donnell were not obliged to believe the nuances of Mastandrea's self-serving explanation or the denials of his ardent supporters as to his role in the distribution of "Wake Up Willoughby." In contexts such as the political arena, the press need not accept "denials" however vehement; such denials are so commonplace in the world of polemical charge and countercharge that they, in themselves, hardly alert the conscientious reporter to the likelihood of error. *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113, 121 (2d Cir.) *cert. denied*, 434 U.S. 1002 (1977). *See* also, *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. at —, 109 S.Ct. at 2698, n.37. Assuming such denials are true, they are *not* clear and convincing evidence of actual malice. *Edwards v. National Audubon Society, Inc.*, 556 F.2d at 121.

Mastandrea also claims that the News-Herald's editing of the Article, after O'Donnell completed it, evidenced

actual malice. However, the newspaper's editing of the Article was part of its normal editorial process and was based on "From R. Mastandrea." Such "editing" does not provide probative evidence of actual malice.

O'Donnell's comments in the November 10th conversation with Mastandrea, after-the-fact, evidences no more than O'Donnell's sympathy with Mastandrea's chagrin at his election defeat and O'Donnell's observation that, in general, newspapers could apply professional standards a little better. Even if O'Donnell's comments were relevant and probative of the News-Herald's subjective approach to the truth at the time of the Article's publication, his comment to Mastandrea is no more than a rhetorical statement on professional publishing standards, a departure from which does not meet the *New York Times* actual malice standard in any case. *Harte-Hanks Communication, Inc. v. Connaughton*, 491 U.S. at ——, 109 S.Ct. at 2698-2699.

The facts in this case are in stark contrast to cases demonstrating actual malice, such as *Connaughton* and *Butts*. Mastandrea's defamation charge states no more than a semantical disagreement with the News-Herald's word choice. There is no clear and convincing evidence that the News-Herald's words misrepresented the facts and events they were meant to describe. Certainly nothing in the News-Herald or O'Donnell's language suggests a reckless disregard for the truth. Mastandrea's hair-splitting approach to the News-Herald's word choice in this case proposes to subject every word to scrutiny for its literal sense. Such an approach would seriously impair the freedom of the press by requiring the media to research every possible meaning of words and verify to a certainty that the facts comport with every possible meaning. Liability for error under this analysis would erode the actual malice standard to include every innocent or negligent misstatement and seriously impair the freedom to criticize public officials as well.

> [S]anctions against either innocent or negligent misstatment would present a grave hazard of discouraging the press from exercising the constitutional guarantees. Those guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society.

Time, Inc. v. Hill, 385 U.S. 374, 389 (1967).

Mastandrea's argument simply presents no case for actual malice. The Ohio Court of Appeals correctly affirmed the award of summary judgment in this case. The United States Supreme Court should decline *certiorari*, as this case does not involve a decision on a federal question which conflicts with a decision of any other state court of last resort or a United States Court of Appeals. Neither does this case present an important question of federal law which has not been previously settled by this Court. Moreover, this case presents no decision which conflicts with the precedents set down by this Court. *See* Sup. Ct. Rule 10.1.

III. THE OHIO COURT OF APPEALS CORRECTLY APPLIED THE SUMMARY JUDGMENT STANDARD UNDER OHIO CIVIL RULE 56.

The Ohio Court of Appeals performed a careful, independent review of the record and applied well-settled principles of defamation law and summary judgment in affirming the trial court's entry of summary judgment.

Ohio Civ. R. 56 provides the summary judgment standard for Ohio courts. The Ohio Supreme Court has determined how this standard shall be applied in cases brought by public official/public figures against media defendants. *See Varanese v. Gall*, 35 Ohio St.3d 78 (1988); *Bukky v. Painesville Tel. & Lake Geauga Printing Co.*, 68 Ohio St.2d 45 (1981); *Grau v. Kleinschmidt*, 31 Ohio St.3d 84, 90 (1987); *Dupler v. Mansfield Jour-*

nal Co., 64 Ohio St.2d 116 (1980), *cert. denied* 452 U.S. 962 (1981). Ohio Civ. R. 56(C) provides that summary judgment shall be rendered where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[6] In opposition to summary judgment, Ohio Civ. R. 56(E) requires the non-moving party to come forward with evidence sufficient to establish a genuine issue of material fact.[7] In determining whether a genuine issue of material fact exists, the Ohio courts must apply the requisite substantive evidentiary burden. *Varanese v. Gall*, 35 Ohio St.3d at 80 (following *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 254).

Thus, Mastandrea, as a public-official plaintiff in a defamation case, had the burden of bringing forth clear and convincing evidence that the challenged publication was false and published with actual malice. *Philadelphia*

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[6] Ohio's rule is closely similar to Fed. R. Civ. P. 56. Ohio Civ. R. 56(C) states in pertinent part:

> Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor.

[7] Ohio Civ. R. 56(E) further provides in pertinent part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Newspapers, Inc. v. Hepps, 475 U.S. at 775-78; *accord*, *Varanese v. Gall*, 35 Ohio St.3d at 78; *New York Times Co. v. Sullivan*, 376 U.S. at 279-280.

The moving party's burden of showing no genuine issue of material fact does not relieve the non-moving party of his own burden of producing in turn clear and convincing evidence that would support a jury verdict in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 256. In the words of the United States Supreme Court:

> When determining if a genuine factual issue as to actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under *New York Times*. For example, there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence.

Id. at 254.

The non-movant does not meet this burden by merely raising a few nonessential contradictory facts. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248. There can be no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may not be counted. *Id.* at 249. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252.

Mastandrea's evidence opposing summary judgment in the instant case was little more than the scintilla rejected

in *Anderson*. Mastandrea's quarrel with the words "admit" and 'distribute" simply does not meet the high standard of clear and convincing evidence required to survive a motion for summary judgment. Even if the News-Herald's statement was not true, that in itself would not establish actual malice. Malice cannot be presumed or inferred from the fact that a statement is false but must be separately established by the Plaintiff. Beyond his argument over word choice, Mastandrea offered no evidence of actual malice.

Mastandrea's assertion of clear and convincing evidence does not bear close scrutiny; his argument is nothing more than a bare allegation of falsity and a reporter's vague post-publication statement that journalists might police themselves better. Mastandrea's argument is obliterated by the clear import of his own publication, "From R. Mastandrea," and his own culpability revealed therein.

The Ohio Court of Appeals correctly applied well-settled defamation law in the summary judgment context, in affirming the trial court's entry of summary judgment against Mastandrea. Mastandrea has presented no grounds to disturb that holding.

CONCLUSION

For the foregoing reasons, Respondents request that the United States Supreme Court deny the Petition. The foregoing demonstrates that this case contains no issue or constitutional error warranting the jurisdiction and opinion of this Court.

Respectfully submitted,

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APPENDIX

APPENDIX

TOP OF THE NEWS/A5

News-Herald Saturday, Nov. 5, 1983

HANDBILLS INFURIATE KNUDSON'S SUPPORTERS

By MARY BARTON
and DAVID W. JONES

News-Herald Staff Writers

Willoughby Mayor Eric R. Knudson's re-election campaign supporters say somebody yesterday flooded the city with anonymous and untrue "smear" literature against him and four City Council candidates.

Knudson treasurer Helyn Morse said it was a cheap "terrible" attack of desperation. An infuriated council-at-large candidate George Gamber added: "Whoever is putting out this crap is a mud-slinging creep."

The sheet attacked Knudson, councilman-at-large candidate George Gamber, Ward 1 Councilman Richard Wagner, Ward 4 Councilman Charles Cox and Ward 6 Councilman Richard Piepsny.

Headlined "Willoughby Can't Be Bought," the flier charged Knudson and the four council candidates with being an "entrenched elite" running on the same slate in Tuesday's election and concealing alleged revenue deficits.

"Why isn't the public aware of all these activities?" the sheet asked. "Answer: because the mayor and his handpicked cronies will spend thousands and thousands to buy your vote and keep you uninformed.

"Why isn't the public aware of this? Answer: because the mayor and his four handpicked councilmen are keeping this from you until after the election."

Knudson couldn't be reached. He was watching "West Side Story" at Andrews School in Willoughby.

Service Director George Tegner said, "It's untrue, of course. It's yellow journalism at its worst. The mayor and his campaign has never indulged in this kind of scurrilous literature. It's the last-ditch effort of somebody trying to create confusion."

County Elections Board Chairman E. W. Mastrangelo said nobody has yet filed a complaint with the board or asked it to investigate.

"If it's unsigned, it violates the law," Mastrangelo said.

Cox said, "It's obviously somewhat slanderous. It implies that I was a handpicked crony of the mayor when, in fact, I had not met the mayor until I was appointed."

Gamber, the former Ward 4 councilman, found out about the literature at 10 last night when his son handed him the sheet as he talked with The News-Herald.

Piepsny, who is unopposed, said, "You can't give too much credit to something that goes out without a name on it."

Morse said, "My father always told me you can't fight a skunk because you can't lower yourself to his level and he won't rise to yours."

She compared the attack to the alleged unfair campaign practices case which brought criminal charges against four persons in Geauga County in a trial to begin Monday.

TOP OF THE NEWS/A5

News-Herald Sunday, Nov. 6, 1983

HANDBILL DRAWS CONDEMNATION IN WILLOUGHBY

By DAVID W. JONES

News-Herald County Editor

Willoughby Mayor Eric R. Knudson's challengers disavow any knowledge of who distributed anonymous literature against Knudson and four council candidates, all five of whom say it was an 11th hour dirty tricks "smear" campaign.

The literature said "the mayor and his hand-picked cronies will 'spend thousands and thousands to buy your vote and keep you uninformed." Distributors flooded Willoughby with it Friday.

Attacked were the candidacies of Knudson, Councilman-at-large George L. Gamber, Ward 1 Councilman Richard A. Wagner, Ward 4 Councilman Charles W. Cox and Ward 6 Councilman Richard A. Piepsny.

Mayoral candidate Stewart W. Savage said he had publicly questioned Knudson running with people he had appointed to council. But Savage condemned the literautre and its distributors, and said he had nothing to do with it. He said he plans to file a complaint on Monday, asking the Lake County Board of Elections to investigate.

Knudson himself said he doesn't believe Savage had anything to do with the handbill.

Mayoral candidate Roland J. Mastandrea also said he had nothing to do with the literature. He said some of its statements were true, though distastefully worded.

Of those reached, all other candidates condemned the anonymous sheet.

[Picture Omitted in Printing]

'I think the people of Willoughby are going to see through all this. I think it's going to have a reverse effect (on the outcome of the election).'

—Willoughby Mayor Eric R. Knudson

Knudson said, "I don't think the Savage group is responsible for it. I'm not ashamed of my campaign at all, but somebody ought to be ashamed of theirs."

Savage, a Willoughby attorney and former assistant county prosecutor, said, "I would never violate the law. My professional reputation and my background as a lawyer is more important to me than any particular political campaign. I will live with that reputation the rest of my life."

Ward 2 Councilwoman Cindy Savage, the mayoral candidate's wife, said, "I hate the thought that someone did this intentionally. The fact they won't sign it says something as far as I'm concerned."

The Savages and Knudsons were together Friday night at a social outing as the sheets were being placed in homeowners' doors and mailboxes.

Mastandrea said, "Reading it over and really looking at it, I guess there are different ways people could take the statements. But there are parts of it in poor taste."

Mastandrea said some of the statements on the sheet were true although poorly stated.

"The part about them endorsing each other is true," Mastandrea said. "The part about 'they owe' each other is possibly not a good choice of words."

The sheet claimed city revenue is below projections, but said "the mayor and his four hand-picked cronies are keeping this from you until after the election."

Mastandrea said, "About the money, this is true. But it has been made public, although it's not been publicized that much. They should have at least put their name on it and used a different choice of words."

Knudson said his committee will ask the county elections board Monday to investigate the sheet.

Savage said he might ask the county forensic crime laboratory's handwriting analysis expert to check the handwritten headlines: "Willoughby Cannot Be Bought" and "Wake Up Willoughby."

Knudson said, "I think the people of Willoughby are going to see through all this. I think it's going to have a reverse effect (on the outcome of the election)."